

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.M. et al., Persons Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

K.S.,

Defendant and Appellant.

E046791

(Super.Ct.Nos. J196380, J196381
& J207985)

OPINION

APPEAL from the Superior Court of San Bernardino County. A. Rex Victor,
Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and
Appellant.

Ruth E. Stringer, County Counsel, and Jeffrey L. Bryson and Adam Ebright,
Deputy County Counsel, for Plaintiff and Respondent.

William D. Caldwell, under appointment by the Court of Appeal, for Minors.

K.S., the maternal grandmother of S.M., currently age eight, and C.M., age six, had custody of her grandchildren from November 2004 to February 2007, and she was in the process of adopting them. However, in January 2007, the San Bernardino County Children and Family Services (CFS) learned she had concealed the fact she was married to an individual with a substantiated sexual abuse history, and had permitted him to have unmonitored contact with the two young girls. Subsequently, the two girls were removed from her custody, and, still later, visitation rights respecting S.M. and C.M., as well as a younger grandchild, S.S., were terminated.

Grandmother filed a petition to modify the order of removal as well as the suspension of visits (Welf. & Inst. Code,¹ § 388 [388 petition]) which was denied. Grandmother appeals from the denial of a second continuance of the hearing on the 388 petition, as well as the denial of the petition on the merits. We affirm.

BACKGROUND

C.M. and S.M. were removed from their mother on July 24, 2004, due to the mother's chronic substance abuse and mental health issues. The two sisters were placed with their maternal grandmother, K.S., the appellant in this matter, and on July 18, 2005, parental rights were terminated as to the girls, with a permanent plan of adoption by the maternal grandmother.

On April 27, 2006, mother gave birth to a third daughter, S.S. (half-sister to C.M. and S.M.), but she contacted CFS the day after the birth because she was unable to care

¹ All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

for the infant. CFS could not consider K.S. for placement of the infant S.S. because, in addition to C.M. and S.M., K.S. was caring for her two elderly parents, a developmentally disabled daughter, and two other children under the age of five, while in the process of adopting her granddaughters. A dependency petition was filed as to S.S. and the mother submitted on the allegations. The juvenile court declared S.S. to be a dependent child and placed her in the foster home of the Z. family.

C.M. and S.M. lived with their grandmother from November 15, 2004, till January 22, 2007, when they were removed from grandmother's home just as the adoption process was almost completed. The removal was due to the adoption worker's discovery that grandmother had been secretly married for six years to a man who had been accused of sexual abuse. A background check of the husband revealed substantiated sexual abuse allegations against him. Grandmother claimed he never lived in the home, but the court found this explanation incredible. Because grandmother had permitted the husband to have unsupervised contact with the children, C.M. and S.M. were removed from grandmother's home and ordered placed in a concurrent planning home with a goal of adoption.

On April 5, 2007, mother's reunification services were terminated as to S.S. after she resumed her drug use and stopped visiting, and a hearing to select and implement a permanent plan (§ 366.26) was set. S.S. was developing slowly and had characteristics resembling a child with fetal alcohol syndrome. S.S. remained in her nonrelative placement continuously and, after a slow start, she was developing relatively normal by the time of the hearing to select and implement a permanent plan. The nonrelative

caretakers were committed to adopting S.S. On April 9, 2007, mother died of a drug overdose. The parental rights of S.S.'s father were terminated on August 3, 2007, freeing her for adoption by the Z. family.

As of April 2007, C.M. and S.M. were placed together in a foster home and visited grandmother weekly. Eventually, they were transitioned to a relative's home. The children missed their grandmother, but over time were able to adjust to their new placement. On April 9, 2007, the juvenile court reduced grandmother's visits to one time per month, instead of weekly, so that S.M. and C.M. could bond with their relative caretaker.

In October, 2007, S.M. was removed from her relative placement because of sexual acting out behavior. S.M. was placed in a nonrelative home that was not interested in adopting her. Beginning in June 2007, visits with grandmother became problematic. C.M. experienced eating and sleeping problems after visits with grandmother. Grandmother led the girls to believe they would be coming back to live with her again. On one particular visit in which grandmother was apparently ill, she showed up in a public place to visit with the girls unkempt and wearing her pajamas. Subsequently, S.M. wanted to wear her pajamas to go outside and informed her caretakers she did not have to listen to them. Grandmother also made inappropriate calls to C.M.'s caretaker. As a consequence, CFS requested and the court ordered the suspension of grandmother's visits on January 17, 2008.

Thereafter, C.M. remained in her relative placement, although her relatives were hesitant to adopt. There were concerns about her eating habits and a possible eating

disorder. The nonrelative caretakers of S.M. were not interested in adoption, but were willing to provide long term care for her. The permanent plan for C.M. was changed to a plan of legal guardianship, which would make it easier for the relative caretakers to access services needed for C.M.'s behavioral and mental problems. For S.M., the permanent plan of adoption was still considered reasonable and a search was initiated to find an appropriate adoptive home. S.S.'s caretakers were in the process of adopting her.

On August 13, 2008, grandmother filed petitions to modify the prior orders (§ 388) terminating her visits with her grandchildren, and requested either placement of the children with her, or, in the alternative, reinstatement of visits with all three girls. She asserted that her circumstances had changed because she had attended counseling, received an Associate of Arts (AA) degree in child development, had separated from her husband and was divorcing him. Her declaration in support of the petition reflected she had attended counseling to deal with grief over the deaths of her father, mother, and daughter; and that she received her AA degree to help her with her developmentally disabled daughter. A copy of her diploma reveals it was awarded in the year 2000. Nevertheless, the court set the matter for a nonevidentiary hearing on September 9, 2008.

On September 9, 2008, an attorney appeared on behalf of grandmother's counsel to request a continuance of the hearing in order to give the attorney of record an opportunity to respond to the county's opposition to her 388 petition. The matter was continued to September 12, 2008. On September 12, 2008, the matter was called. The court noted that there were phone calls from grandmother's counsel inquiring about filing a motion to continue by fax. He was informed the court does not accept fax filing. The

same attorney, who had made the previous appearance on behalf of grandmother's counsel, appeared at this hearing. The court denied a continuance, and then denied the 388 petition. Grandmother appeals.

DISCUSSION

1. The Juvenile Court Did Not Abuse Its Discretion in Denying a Continuance of the Hearing on the 388 Petition.

Grandmother claims the juvenile court abused its discretion in denying the second request to continue the hearing on her 388 petition. We disagree.

Upon request of counsel for the parent, guardian, minor, or petitioner, a juvenile court may continue a dependency hearing for good cause and only for the time shown to be necessary. (§ 352, subd. (a).) Section 352 precludes a juvenile court from granting a continuance where it is contrary to the best interests of the minor. (*In re Michael R.* (1992) 5 Cal.App.4th 687, 694.) The statutory policy has been interpreted as an express discouragement of continuances. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 179.) A denial of a request for a continuance will not be reversed absent an abuse of discretion. (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 585.)

Written notice of the motion to continue is required to be filed two court days before the date set for the hearing to be continued. Further, the motion must be accompanied by affidavits or declarations detailing specific facts showing that a continuance is necessary. (§ 352, subd. (a).) In the present case, the motion was not filed two court days before the date of the hearing to be continued. Instead, counsel attempted to fax a motion for continuance on the eve of the hearing, explaining he had to appear on

a case in San Diego, and substitute counsel tendered a written continuance request for the court to consider. No oral motion to continue was made.

The court observed that on September 9, 2008, substitute counsel requested the continuance until September 12, 2008, in order to reply to CFS's response to the 388, but said nothing of the matter pending in the San Diego Juvenile court. Grandmother's counsel made no proper motion to continue so there was no abuse of discretion.

Even if a proper and timely motion had been made, reversal would not be required because grandmother has not demonstrated prejudice from the ruling. The matters raised in grandmother's 388 petition were not new or changed circumstances, and none of the circumstances alleged in the petition demonstrated that a modification of the prior order would serve the children's best interests. The petition alleged only that prior to the children's removal from her home (in January 2007), grandmother had a strong and loving relationship with them, and that she missed them. This allegation does not demonstrate how the children would be best served by a modification.

The grandmother was present at the hearing with substitute counsel who had previously appeared on behalf of grandmother's retained counsel. Grandmother asserts that in setting the 388 petition for nonevidentiary hearing, the court denied her right to present evidence at the hearing, suggesting that she was prejudiced by having to proceed without her retained attorney. However, the substitute counsel made no such argument to the juvenile court so the record is silent as to the possible existence of additional information or evidence. Nevertheless, the court read and considered the petition and its

attachments before ruling, and did not abuse its discretion in denying the second continuance.

2. The Court Did Not Abuse Its Discretion In Denying the 388 Petition.

Grandmother also argues that the order denying her 388 petition was error where visitation with grandmother was in the children's best interests and where the issue of grandmother's secret marriage had been resolved. We disagree.

A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-317.) To trigger the right to a hearing on the petition, the petitioner need only make a prima facie showing of these elements, and the petition should be liberally construed in favor of granting a hearing to consider the petitioner's request. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310.)

A "prima facie" showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) Where the allegations of the petition, even when liberally construed, do not make a prima facie showing of either changed circumstances or that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.) A petition which includes general, conclusory

allegations, does not rise to the level of a “prima facie” showing. (*In re Edward H.*, *supra*, at p. 593.)

The juvenile court has discretion whether to provide a hearing on a petition alleging changed circumstances. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431.) We review a summary denial of a section 388 petition for abuse of discretion. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460.) We examine each prong of section 388 to determine if the juvenile court abused its discretion.

The petition alleged the following changes in grandmother’s circumstances: (1) she had attended counseling for a year; (2) she had received an AA degree in child development; and (3) she had separated from her husband and was in the process of a divorce. However, upon closer examination, the petition did not demonstrate a material change of circumstances. The counseling sessions referred to by grandmother related to her grief issues resulting from the recent deaths of her parents and her daughter within a short period of time. The associates degree was earned in the year 2000, so it predated not only the dependency, but also the birth of any of the grandchildren involved in this matter. Further, grandmother’s declaration explained she obtained the degree to help her with her developmentally disabled daughter. This was not a change of circumstances.

As for the alleged separation from her secret husband, this was not a change of circumstances because she had always asserted they lived separately. Grandmother argues that her relationship with her husband was the only obstacle to visitation, and that because that issue was resolved, modification is warranted. There are several problems with this assertion.

First, grandmother's poor judgment in keeping her marriage to someone with a sexual abuse history a secret was not the only obstacle to visitation with the children. Although it was the reason for the removal of the children, it was grandmother's conduct during visits and the children's reactions to those visits that resulted in the termination of visits.

Second, although pursuing a divorce might have been a change of circumstances, grandmother did not provide any documentary evidence that a proceeding for dissolution of marriage had been initiated as an attachment to her petition.

CFS asserts that the juvenile court lacked authority, by way of a 388 petition, to modify the order removing C.M. and S.M. from grandmother's custody. Because parental rights had previously been terminated, CFS was entitled to the exclusive care and control of the child, subject to judicial review for an abuse of discretion. (§ 366.26, subd. (j); *Dept. of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, 724, 732-733.) This means that CFS has the exclusive authority to make placement decisions of children for adoption purposes. (*Ibid.*) We do not have to reach this issue because the petition did not establish an adequate change of circumstances.

CFS also argues that its exclusive care and control of the children after termination of parental rights extends to decisions about visitation. We do not reach this question. The denial of the request to reinstate visits was reasonable because the petition did not make an adequate showing that circumstances were changed or that the children's best interests would be served by the requested relief. The court did not abuse its discretion in denying the 388 petition.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/King
J.